consideration of all the circumstances, I quash the sentence of imprisonment imposed upon him and increase his fine to one of $2,000 which is the maximum allowed under the law. In default, he will go to prison for 9 months.

As regards the second appellant, the point has been made that he is a man of good character who has some social standing in the local society. I would point out that his social standing is no ground for interfering with the sentence and neither is any social stigma resulting from conviction and sentence. In the case of *R.* v. *Cargill,*[7] the English Court of Criminal Appeal said at page 231: —

"In addition to this it is very desirable, if possible, to pass a sentence on a man in a good position exactly the same as on a man in a different position; it is true the sentence is harder, but the offence is correspondingly greater; the man ought to know better and the way of meeting that is to give exactly the same sentence; the sentence is worse, but, by reason of the prisoner's position, the offence is worse."

The record of the lower court shows that he was not involved in the offence to such a degree as the first appellant and in all the circumstances since I had quashed the sentence of imprisonment upon the first appellant, the sentence of imprisonment upon the second appellant is also quashed. The sentence of fine is affirmed and I vary the order of the magistrate to the extent that in default of the payment of fine, the second appellant shall go to prison for 6 months.

Lest it be thought that an offence of this sort will not attract a sentence of imprisonment, I would make it clear that, where the circumstances warrant it, the courts can, and will, impose sentences of imprisonment.

Order accordingly.

SINGAH MOHAMED HUSSIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Othman J.) May 26, 1973]

[Kuantan — Criminal Appeal No. 9 of 1972]

Criminal Law and Procedure — Amendment of charge after close of defence — Amended charges not read over and explained to accused — Whether irregularity curable — Criminal Procedure Code (Cap. 6), ss. 158(ii) and 422.

In this case the appellant had been charged under section 414 of the Penal Code on two charges that he "voluntarily disposed" of certain properties. At the close of the defence, the learned magistrate ordered the charges to be amended by substituting the words "assisted in disposing of" for the words "disposed" but he did not read over and explain the amended charges to the appellant. The appellant appealed against his conviction and sentence.

Held: (1) the omission by the learned magistrate to read and explain the amended charges to the appellant was an irregularity which was not curable by section 422 of the Criminal Procedure Code as it was contrary to a statutory requirement;

(2) the conviction and sentence of the appellant must therefore be quashed and a retrial ordered.

Cases referred to:-

(1) *Chong Chee Fah* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 45,

(2) *Public Prosecutor* v. *Ong Eng Kiat* [1947] M.L.J. 180.

(3) *Govindasamy* v. *Public Prosecutor* [1949] M.L.J. 101.

(4) *Lim Tuan Heng* v. *Hermann Jebson & Co.* (1885) 4 Ky. 78.

CRIMINAL APPEAL.

N. Ramachandaran for the appellant.

Ahmad bin Abdul (Deputy Public Prosecutor) for the respondent.

Syed Othman J.: The appellant was convicted by the magistrate at Temerloh of two offences under section 414 of the Penal Code and sentenced on each charge to a fine of $900 in default 6 months imprisonment.

The appeal is on a point of law as to the procedure adopted by the learned magistrate after amending the charges at the close of the defence.

Each of the charges against the appellant read:

"That you ... voluntarily disposed of property to wit, a cheque ... which you had reason to believe to be stolen property and that you have thereby committed an offence under section 414 of the Penal Code."

The offence which section 414 of the Penal Code creates so far as applicable to this case is "assists in the disposal of property..." and not "disposes of property..." as appearing in the charges.

On the evidence adduced by the prosecution the defence was called. At the close of the defence, according to the record, the learned magistrate noted to the effect that he had overlooked a point and that the charges ought to have been amended by substituting the words "assisted in disposing of" for the word "disposed". The learned magistrate then amended the charges and convicted the appellant. The record does not show that the learned magistrate had read over and explained the amended charges to the appellant. Section 158(ii) of the Criminal Procedure Code (the Code) provides that every alteration and addition to the charge "shall be read and explained to the accused."

The question to be determined is what is the effect of a trial which did not comply with this provision.

For the appellant it is mainly argued, relying on *Chong Chee Fah* v. *Public Prosecutor,*[1] that the trial was a nullity. In this case the appellant was charged with "assisting in the management of a public lottery" under section 4(i)(c) of the Common Gaming Houses Enactment (Cap. 47). It was held that as there was no such offence under the section the trial was a nullity, and as the proceedings in the court below were a nullity, a retrial could not be ordered.

For the respondent it is argued that the omission by the learned magistrate to comply with section 158(ii) is curable by section 422 of the Code which reads, so far as applicable to the present case:

"Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account — of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceeding under this Code; or

....

unless such error, omission... has occasioned a failure of justice."

It is urged in effect that the appellate court may overlook an omission by the court below to comply with a procedural provision, if there is no failure of justice.

I think *Chong Chee Fah* v. *Public Prosecutor, supra,* must be distinguished from the present case. In that case the conviction was of an offence unknown to law. In the present case the charges before conviction were in fact amended to offences known to the law.

In *Public Prosecutor* v. *Ong Eng Kiat*[2] the appellant was charged with the offence of receiving. After the defence was concluded the court itself framed a fresh charge of theft in a dwelling house under section 380 Penal Code. Although section 158(i) of the Code provides that any court may alter or add to any charge before judgment is pronounced, Tawlor J. said at page 181: —

"Now the proper time to amend a charge is at the close of the prosecution. This is expressly provided by section 173(h) of the Code which, indeed, not merely authorises but positively requires the court to consider the charge at that stage and, if necessary, amend it. It is true that a charge can be altered at any stage and the alteration in this case, late though it was, is not illegal in the sense that it was not an amendment but a substitution and further, it was the substitution of a much more serious charge."

I am obliged to Mr. Ramachandaran for having drawn my attention to the case of *Govindasamy* v. *Public Prosecutor.*[3] The Court of Appeal in that case held that the omission to comply with those mandatory provisions of the Code is not merely an irregularity which can be cured by section 422.

In *Lim Tuan Hong* v. *Hermann Jebson & Co.*,[4] dealing with a case similar to the present in Penang, Wood J. at page 81 remarked: —

"... the omission to read the amended charge to the prisoner, was an irregularity of a grave kind, and... I think that in the interests of justice, the irregularity should not be overlooked."

Section 158(ii) is clearly a mandatory provision. Although *Govindasamy's* case was a decision made on the omission by a trial judge to give judgment as required by section 198(i) of the Code after the assessors had given their opinion that the accused was guilty of murder, I am of the opinion that the mandatory provisions referred to by the Court of Appeal should include section 158(ii) of the Code. *Lim Tuan Hong's* case has stood the test of time. It was decided in 1885.

The omission by the learned magistrate to read and explain the amended charges to the appellant in the present case is therefore not curable by section 422 of the Code, as it is contrary to a statutory requirement. However, in neither of the two cases which I have just cited the courts declared that the proceedings were a nullity.

I would therefore allow the appeal, quash the conviction and sentence and order a new trial before another magistrate. Pending the new trial the appellant is allowed bail in the sum of $2,000 with one surety.

Appeal allowed. New trial ordered.

Solicitors: *N. Ramachandran & Co.*

HAJJAH SITAM v. HASSAN & ANOR.

[A.C.J. (Wan Suleiman J.) July 18, 1973]

[Seremban — Civil Appeal No. 7 of 1970]

Customary Tenure Enactment (F.M.S. Cap. 215), s. 5 — Whether customary land is vested in holder or in the waris — Submission of no case to meet — Subordinate Courts Act 1948 (Act 92), s. 70 — Subordinate Courts Rules, 1950.

The appellant had sued for recovery of immovable property which she claimed were being wrongfully occupied by the respondents, who were her granddaughter and the latter's husband. The defence was *inter alia* that since the land in question was customary land it was vested under customary law in the *waris* of the plaintiff and not solely in the plaintiff so that the second appellant was one of the co-owners of the land. It was argued that the action concerned a dealing in customary land within the meaning of section 5 of the Customary Tenure Enactment. The learned magistrate dismissed the claim and the appellant appealed.

Held: (1) the dealings contemplated in section 5 of the Customary Tenure Enactment must be of the nature of transfer, charge or transmission and does not include a suit for ejectment or for the recovery of immovable property;

(2) the appeal must be allowed and the case remitted for re-trial.

Case referred to:-

(1) *Yuill* v. *Yuill* [1954] 1 All E.R. 183.

CIVIL APPEAL.

S. K. Lingam for the appellant.

First respondent in person; second respondent absent.

Wan Suleiman J.: The appellant is the plaintiff in a civil action before the magistrate, Kuala Pilah, wherein she sued for the recovery of immovable property *i.e.* for possession of premises situated on E.M.R. 79 Lot 503 in the Mukim of Juasseh, District of Kuala Pilah, which she claimed were being wrongfully occupied by her grand daughter and the latter's husband, who were tenants at will. In so far as the plaintiff is concerned therefore the magistrate would be well within his civil jurisdiction under section 70 of the Subordinate Courts Act, 1948 (Act 92).

Counsel for the defendants, at the close of the case for the plaintiff made submissions on the law, the gist of which was that this action concerns a dealing in customary land within the meaning of section 5 of the Customary Tenure Enactment (Cap. 215) of the Laws of the Federated Malay States.

The amended statement of defence alleged (1) that since the land in question is customary land, it is vested under customary law in the *waris* of the plaintiff and not solely in the plaintiff, so that the second defendant is one of the co-owners of the land, and alternatively (2) that by adoption and on a ceremony, the land had been given by the plaintiff to the second defendant.

The first issue of law, and the second of fact the plaintiff denied in her reply to the amended defence.

I would apply the *ejusdem generis* rule and say that dealings which are contemplated in section 5 must be of the nature of a transfer, charge or transmission and does not include a suit for ejectment or for the recovery of immovable property.

Since issue (1) above is an issue of law and should not by right have appeared in the pleadings, and should